No. 83-95

In the Supreme Court of the United States

October Term, 1983

ERNEST S. PATTON, Superintendent, SCI-CAMP HILL, and HARVEY BARTLE, III, Attorney General of the Commonwealth of Pennsylvania,
Petitioners

v.

JON E. YOUNT,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether pre-trial publicity of Respondent's re-trial infringed on his ability to select and impanel a fair and impartial jury in light of the provisions of the Sixth Amendment to the Constitution of the United States?

II. Whether a federal court in reviewing a state court conviction by way of a habeas corpus petition may disregard the sworn testimony of jurors to remain impartial and find that the defendant was denied a fair trial on the basis that the jurors were biased by pre-trial publicity?

III. Whether the federal court of appeals improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), as to juror prejudice to a state court conviction thereby violating the holding set forth in *Murphy v. Florida*, 421 U.S. 794 (1975)?

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

OTHER AUTHORITIES:

CITATIONS TO OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 710 F.2d 956 (3d Cir., 1983) (J.A. 833a).

The judgment of the United States Court of Appeals for the Third Circuit (J.A. 892a) is not reported.

The opinion of the United States District Court for the Western District of Pennsylvania is reported at 537 F. Supp. 873 (W.D. Pa., 1982) (J.A. 783a).

The order of the United States District Court for the Western District of Pennsylvania (J.A. 809a) is not reported.

The opinion of the Supreme Court of Pennsylvania is reported at 455 Pa. 303, 314 A.2d 242 (1974) (J.A. 277a-293a).

STATEMENT OF JURISDICTION

On April 22, 1982, the United States District Court for the Western District of Pennsylvania denied Respondent's petition for a writ of habeas corpus with prejudice. Respondent appealed this order to the United States Court of Appeals for the Third Circuit which, on May 10, 1983, vacated the judgment of the District Court and directed that the writ of habeas corpus should be granted unless the Commonwealth of Pennsylvania affords Yount with a new trial within a reasonable period of time.

On May 25, 1983, pursuant to motion of the Petitioners herein and Rule 41 (b) of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Third Circuit entered an order staying issuance of the certified judgment to June 30, 1983. The stay was extended upon motion of the Petitioners to July 30, 1983. It was further stated that if during the period of the stay the Court received notification from the Clerk of the Supreme Court that a petition for writ of certiorari had been filed, the stay would continue in effect until final disposition by the Supreme Court.

From the order of the United States Court of Appeals for the Third Circuit granting a new trial, the Petitioners filed a petition for writ of certiorari with this Court on June 29, 1983. Certiorari was granted on October 17, 1983. The jurisdiction of the Supreme Court to review the decision of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which are involved in the instant matter are the Sixth and Fourteenth Amendments to the United States Constitution which provide:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 28, 1966, the body of Pamela Sue Rimer, a senior at DuBois Area High School who resided near Luthersburg, Pennsylvania was found in a wooded area adjoining a red-dog road leading from her school bus stop to her rural home. The autopsy revealed that the cause of death was due to shock, loss of blood and strangulation due to an excess of blood in her lungs. Examination revealed numerous wounds about the girl's head caused by a blunt weapon, three slashes across her throat and cuts of the fingers on her left hand caused by a sharp instrument. When found, the girl's body was not fully clothed, in that one stocking and one shoe had been removed and the stocking tied about her neck.

Respondent, Jon E. Yount, was arrested April 29, 1966, on charges of murder and rape filed to No. 2 May Sessions 1966 in the Court of Quarter Sessions of Clearfield County, Pennsylvania. The case proceeded to trial on September 28, 1966, and on October 7, 1966, the Respondent was pronounced guilty by jury verdict of murder of the first degree and rape. The jury further pronounced sentence as life imprisonment. Following the denial of post-trial motions, Respondent appealed from the judgment of sentence to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania reversed the conviction and ordered a new trial on the basis of *Miranda v. State of Arizona*, 384 U.S. 436 (1966), which had been decided in the period of time between the date of Respondent's arrest and the date of trial. *Commonwealth v.*

Yount, 435 Pa. 276, 256 A.2d 464 (1969). The Commonwealth appealed the ruling of the Pennsylvania Supreme Court with certiorari having been denied at 397 U.S. 925 (1970).

Prior to retrial, hearings were held on or about June 4, 1970, July 29, 1970, and August 17, 1970 with regard to Respondent's pre-trial motions as to change of venue on the basis of inability to select a fair and impartial jury and suppression of confessions and evidence obtained therefrom. The Court by memorandum and order filed September 21, 1970 (J.A. 259a-261a) denied the change of venue request and indicated that it would be bound by the guidelines as to the suppression of evidence as set forth by the Supreme Court of Pennsylvania in its opinion rendered in the instant case found at *Commonwealth v. Yount*, 435 Pa. 276, 256 A.2d 464 (1969); *cert. denied*, 397 U.S. 925 (1970).

Jury selection for the retrial commenced on November 4, 1970, with the actual trial beginning on November 17, 1970. A second petition for change of venue was filed on November 13, 1970, during jury selection for the instant case, but was denied by memorandum and order of the Court dated November 14, 1970 (J.A. 262a-266a). On November 20, 1970, the jury returned a verdict of guilty of murder of the first degree. The rape charge was not tried by the Commonwealth at retrial. After denial of post-trial motions (J.A. 276a), Yount was formally sentenced on March 26, 1973. The judgment of sentence was appealed to the Supreme Court of Pennsylvania. That Court by opinion found at *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242 (1974) (J.A. 277a-293a) affirmed the judgment of sentence finding that Respondent had not been denied his right to a fair and impartial jury.

Yount, pursuant to 28 U.S.C. §2254, filed a petition for writ of habeas corpus pro se with the United States District Court for the Western District of Pennsylvania on or about January 5, 1981 (J.A. 297a-309a). One issue within the habeas corpus petition dealt with whether he had been able to select a fair and impartial jury. It is that issue which is now before this Court for review. Counsel was appointed to represent Yount and an answer to the petition was filed by the Petitioners herein (J.A. 310a-335a). Following the filing of an amended petition (J.A. 350a-358a) and an amended answer (J.A. 359a-392a), evidentiary hearings were held before the Honorable Robert C. Mitchell, United States Magistrate on November 3, 1981 (J.A. 395a-687a) and December 28, 1981 (J.A. 689a-743a) at which time both parties placed testimony on record with regard to the merits of the petition.

On February 12, 1982, the Honorable Robert C. Mitchell issued his recommendation and report (J.A. 744a-769a) which recommended that a writ of habeas corpus should issue on the basis that the Respondent, herein, could not have received a fair and impartial jury trial within Clearfield County. The Petitioners, herein, filed objections to the Magistrate's report and recommendations (J.A. 770a-777a) on February 19, 1982 on the basis that the Magistrate had improperly applied the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), to the instant case. After oral argument before the Honorable Donald E. Ziegler, United States District Judge, the petition for writ of habeas corjus was denied with prejudice by opinion and order dated April 22, 1983 (J.A. 783a-809a). The District Court expressly found that Yount:

> ". . . has failed to establish that: (1) excessive and biased pre-trial publicity prevented a fair trial;

(2) substantial and undue community bias required a change of venue; and (3) the trial court erred when it denied several challenges for cause. Petitioner's exhausted state claims assail, in part, the factual findings of an experienced trial judge and an appellate jurist of renown. We find an absence of convincing evidence to contradict their finding and we further hold, based on an independent review of the record, that petitioner has failed to establish that this state court judgment is violative of the Due Process Clause of the Fourteenth Amendment." (J.A. 807a-808a)

On May 10, 1983, following the filing of an appeal (J.A. 892a) and the presentation of oral argument, the United States Court of Appeals for the Third Circuit vacated the judgment of the District Court and held that a writ of habeas corpus should issue unless the Commonwealth affords Yount a new trial within a reasonable period of time (J.A. 868a); the reason for such being the Court of Appeals' feeling that Yount had established that pre-trial publicity had caused actual prejudice to a degree rendering a fair trial impossible in Clearfield County (J.A. 867a-868a). The Court of Appeals stated:

"... We must view the jurors' assurances of impartiality in light of the pre-trial publicity, the difficulty of voir dire, and the testimony of the jurors selected. We conclude that despite their assurances of impartiality, the jurors could not set aside their opinions and render a verdict based solely on the evidence presented in court." (J.A. 867a)

Petitioners filed a petition for writ of certiorari on June 29, 1983. Certiorari was granted on October 17, 1983.

SUMMARY OF ARGUMENT

I. The pre-trial publicity surrounding the Yount trial did not infringe on his ability to select and impanel a fair and impartial jury. The standards as to juror impartiality clearly establish that mere exposure of a person to publicity about a case is not sufficient to establish that the person may not sit as a juror. Further the fact that a person may have formed an opinion as to the case does not exclude him from sitting as a juror if it can be shown that he will set aside his opinion and decide the case solely on the basis of the evidence presented at trial. Yount has failed to establish that the pre-trial publicity or influence of the press surrounding his trial was such that it "utterly corrupted" the trial. Each Court, which has reviewed the case, has established by independent review that the publicity was accurate, factual in nature and without editorial comment. It does not rise to that level or magnitude necessary to establish that the trial proceedings were "utterly corrupted."

II. Each time a Federal court accepts a habeas corpus petition from a person held in State custody, friction results within our two-court system. In order to eliminate much of this friction, 28 U.S.C. §2254 (d) provides that a determination made by a State court shall be presumed to be correct. Although it is clear that a Federal court may review a State court conviction, extreme care and caution must be used by the Federal court. A State court conviction may be overturned only in those instances where there has been a clear and evident violation of some right guaranteed to the defendant by the Fourteenth Amendment. When reviewing an assertion as to pre-trial publicity, the

standard is clear that the defendant must establish that the pre-trial publicity was so extreme as to cause actual prejudice or that such press coverage has "utterly corrupted" the trial.

III. This Court's holding in *Murphy v. Florida*, 421 U.S. 794 (1975), makes clear that the standards and methods of review applicable to the Federal courts through *Marshall v. United States*, 360 U.S. 310 (1959), shall not be used to review State court proceedings. A petitioner, who is seeking to challenge a State court conviction by way of a habeas corpus petition, has the burden of establishing that a constitutional provision has been violated. In specific, Yount in the instant proceeding, must establish that the pre-trial publicity surrounding his trial was so extreme that it caused actual prejudice to a degree that he was unable to select and impanel a fair and impartial jury. The determination by the trial court and the Supreme Court of Pennsylvania that actual prejudice could not be found must be accepted as correct pursuant to 28 U.S.C. §2254(d). The Court of Appeals for the Third Circuit clearly erred in finding that the State court's determination was not supported by the record.

An independent review of the record of Yount's case clearly reveals that actual prejudice did not exist nor may it be imputed to those jurors who were ultimately selected to hear the case. The Yount case is clearly distinguishable from that presented to this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961). Nine of the jurors who sat in Yount's case were selected without challenges of any form. The remaining three jurors, although challenged for cause, indicated that they either had no fixed opinion or that they could enter the jury box with an open mind. Voir dire examination is not meant to be reduced to a statistical gen-

eralization of community knowledge of a case but rather should be an individual safeguard of juror impartiality. The Court of Appeals for the Third Circuit erred in its finding that actual prejudice existed to such a degree rendering a fair trial impossible. The jury impaneled to hear the case clearly was free from any prejudice and was able to render its verdict in a fair and impartial manner.

ARGUMENT

I. WHETHER PRE-TRIAL PUBLICITY OF RESPONDENT'S RETRIAL INFRINGED ON HIS ABILITY TO SELECT AND IMPANEL A FAIR AND IMPARTIAL JURY IN LIGHT OF THE PROVISIONS OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. Introduction

The Sixth Amendment to the Constitution of the United States clearly provides that an accused in a criminal proceeding is entitled as a matter of right to a trial, ". . . by an impartial jury of the State and district wherein the crime shall have been committed. . . ." It is equally clear that this right is fully protected and fully applicable in State court proceedings as a result of the operation of the due process provisions of the Fourteenth Amendment.

Throughout the course of history, as both the speed and methods of public communication have increased, the courts have consistently had to resolve the inevitable conflict which has arisen between the publicity generated by a case and the defendant's right to an impartial jury. This Court on innumerable instances has dealt with this particular question. See: *Reynolds v. United States*, 98 U.S. 145 (1878); *Spies v. Illinois*, 123 U.S. 131 (1887); *Holt v. United States*, 218 U.S. 245 (1910); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Murphy v. Florida*, 421 U.S. 794 (1975).

The instant case presents to the Court once again the question as to whether an accused was denied his right to select and impanel an impartial jury due to the effect of pre-trial publicity. In specific, Yount is asserting that his right to be tried before a fair and impartial jury was impaired due to the exposure of the Clearfield County public to publicity which surrounded his first trial, the subsequent appellate proceedings, as well as those matters leading up to the commencement of the second trial. Yount bolsters this assertion by relying on the voir dire transcript from the second trial and its alleged indication that numerous members of the venire had an opinion as to his guilt or innocence or in the least that various members of the panel of jurors admitted that they had heard of and/or discussed the case with others or that they held an opinion as to guilt or innocence which they believed could be set aside when rendering a verdict.

Granted, the case did receive substantial publicity within the Clearfield County area. The Petitioners would submit, however, that the publicity was not such that the members of the jury were prejudiced to Yount's detriment. Likewise, the testimony at voir dire, although evidencing that many persons had heard of or discussed the case, does not evidence that a fair and impartial jury was not selected in Yount's case.

B. Voir Dire Standard

The standard to be applied during voir dire in cases involving pre-trial publicity in order to assure the selection of a fair and impartial jury has been well established by this Court. The law is well settled that simple exposure of

a juror to pre-trial publicity will not automatically taint a juror such that he must be excluded from sitting on a case. "Even if a juror has heard about a case and has read allegations of a defendant's guilt, the juror nonetheless may serve if he or she is capable of laying aside prior impressions and rendering a fair verdict based on the evidence presented at trial." *United States v. Provenzano,* 620 F.2d 985, 995 (3d. Cir. 1980), *cert. denied,* 449 U.S. 899 (1980). See also: *Irvin v. Dowd,* 366 U.S. 717, 723 (1961); *Murphy v. Florida,* 421 U.S. 794, 800 (1975); *Martin v. Warden,* 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied,* 454 U.S. 1151 (1982). "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prosepective juror's impartiality would be to establish an impossible standard." *Irvin v. Dowd,* 366 U.S. 717, 723 (1961). "At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" *Murphy v. Florida,* 421 U.S. 794, 800 (1975) (quoting *Irvin v. Dowd,* 366 U.S. 717, 723 (1961)); see also: *United States v. Provenzano,* 620 F.2d 985, 995 (3d. Cir., 1980), *cert. denied,* 449 U.S. 899 (1980); *Martin v. Warden,* 653 F.2d 799, 804 (3d Cir., 1981), *cert. denied,* 454 U.S. 1151 (1982).

A further factor to be considered in the application of the above standards is that the instant matter before this Court involves Federal review of a State court proceeding by way of a habeas corpus petition. When reviewing an assertion as to pre-trial publicity or change of venue in a habeas corpus proceeding from a State court conviction,

the Federal court's review narrows considerably. A defendant seeking review of his Federal conviction need only show that his jury has been exposed to publicity with a high potential for prejudice in order to allow a Federal court to presume that his jury has been prejudiced. See: *Marshall v. United States*, 360 U.S. 310, 312-313 (1959). "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added.) *Murphy v. Florida*, 421 U.S. at 798, 95 S.Ct. at 2035. See also: *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d. 344 (1977)." *Martin v. Warden*, 653 F.2d 799, 805 (3d Cir., 1981), *cert. denied*, 454 U.S. 1151 (1982). This argument deals only with the issue as to whether the pre-trial publicity "utterly corrupted" the trial within the State court. The question as to whether actual prejudice has been shown is dealt with in Argument III of this brief.

C. Utterly Corrupted Trial Claim

This Court on several occasions has found instances where publicity surrounding a trial has "utterly corrupted" it. In each instance, the inherently prejudicial reporting or influence of the press is patently visible. In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the defendant's confession was broadcast several times on television within the community from which the jury was to be selected. This Court found prejudice to the defendant without even taking the step of a review of the transcript of voir dire of the individual members of the jury. In *Sheppard v. Maxwell*,

384 U.S. 333 (1966), the writ of habeas corpus was issued in an instance where there was extremely inflammatory publicity surrounding the trial as well as where the press totally disrupted the court proceeding. In *Estes v. Texas*, 381 U.S. 532 (1965), the press once again physically disrupted the course of the trial of the case to the extent that it pervaded the proceedings. In *Irvin v. Dowd*, 366 U.S. 717 (1961), there was massive inflammatory publicity prior to trial including information as to the defendant's alleged confessions to some twenty-four burglaries and six murders; his previous record which included convictions for arson and burglary; his identification at a police lineup as well as his offer to enter a plea of guilty for a particular sentence. Further, the newspapers on the day prior to trial carried stories that he had orally admitted to the murder of the victim in the case while at the same time admitting to five other murders.

The pre-trial publicity presented to this Court in the instant case does not even approach the inflammatory nature or magnitude of that found in *Rideau*, *Sheppard*, *Estes*, and *Irvin*. Additionally, there is no evidence of any official involvement in its preparation or dissemination. The publicity involved in the Yount case was spread out over the space of four years. As the Court of Appeals' opinion indicates: "The publicity was understandably most extensive and most potentially prejudicial before and during petitioner's (Yount's) first trial, which was four years before his second trial." (J.A. 861a). The passage of time often tends to negate the effects of pre-trial publicity and decreases the possibility that a juror may be prejudiced as a result thereof. See: *Beck v. Washington*, 369 U.S. 541, 556 (1962); *Murphy v. Florida*, 421 U.S. 794, 802 (1975). The Court of Appeals agreed with the magis-

trate's finding that the second trial "was surrounded with publicity, but not to the same degree" as could be found with regard to the first trial (J.A. 861a, footnote 21). Likewise, the news articles which are involved in the case, even those surrounding the date of the second trial, were found by the Court of Appeals to be accurate, factual in nature and without editorial comment (J.A. 860a). The District Court indicated that the newspaper reports concerning the second trial "were not inflammatory so as to preclude a fair trial. . . . The news reports concerning the exhaustion of various jury panels and the progress of voir dire are to the same effect" (J.A. 789a-790a). The District Court further stated: "The pre-trial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary" (J.A. 789a).

The number of the news articles published with regard to the case clearly does not rise to the level necessary to show that publicity "utterly corrupted" the trial. The Court of Appeals notes that the record indicates sixty-six front page articles were published covering the appeal and second trial (J.A. 861a, footnote 21). In actuality, there were only fifteen news articles within the record on this petition covering the four-year period of time from the conclusion of the first trial to the commencement of the second trial. The remainder of the articles referred to by the Court of Appeals occurred after commencement of the selection of jurors for the second trial. It is important to note that as jurors were selected they were sequestered and thus those persons sitting on Yount's jury were not exposed to the total number of articles as the Court of Appeals' opinion implies.

The extent and nature of the publicity in the present case clearly is not of that type which has been found in the past to have "utterly corrupted" a trial. Each of the courts below, which have independently reviewed the record of the instant case, have found that Yount has failed in establishing that the press coverage surrounding his case "utterly corrupted" the trial.

The trial court filed two memoranda and one opinion dealing with its findings as to claims of prejudicial pre-trial publicity influencing the proceedings of the trial. The first memorandum filed September 21, 1970 (J.A. 259a) prior to the commencement of the retrial stated:

> ". . . the evidence was limited to the facts that without editorial comment of any kinds the newspapers in the County reported the decision of the Supreme Court of Pennsylvania; but it is to be noted that they not only referred to the descending [sic] opinion and quoted it, but also to the majority opinion and quoted it. We do not believe that the mandates of the cases extend so far as to say that the news media cannot publicize, without editorial comment, the decisions of our Courts. It is our belief that this is a necessary and salutary privilege and right of the news media; and that in this instance the reporting did not extend itself beyond that privilege and right." (J.A. 260a)

In the second memorandum, filed November 14, 1970 (J.A. 262a), during the selection of the jury, the trial court stated:

> "The Court would also note that it has been 4 years since the first trial of this cause, and so far as this Court can recall, there has been little, if any, talk in public concerning the trial from that time to the

time when it was announced that a trial date had been fixed.

* * *

Nor do we find any unfair inferences or prejudicial effects as to or against the defendant resulting in any of the newspaper items which have been the subject of the affidavit filed in this regard on November 13, 1970." (J.A. 264a-265a)

In its final discussion of the publicity issue, the trial court in its opinion by which post-trial motions were denied dated January 15, 1973 (J.A. 267a) indicated:

> "The first of the trials occurred in 1966, and as pointed out herein, the second one occurred in 1970. As the record will indicate there was practically no publicity given to this matter through the news media in the meanwhile except to report that a new trial had been granted by the Supreme Court. It is to be noted also that throughout the second trial there was practically no public interest shown in the trial; one thing to be noted is that on some days there being practically no person present even to listen to it." (J.A. 268a)

Following sentencing, the publicity issue was presented to the Supreme Court of Pennsylvania on appeal. Justice Roberts writing for the unanimous court in affirming the conviction stated: "These findings (no excessive pre-trial publicity), fully supported by the record, do not sustain appellant's claim, and the court properly denied appellant's motion for change of venue predicated on this theory." *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974) (J.A. 284a). The courts of the Commonwealth of Pennsylvania have therefore reviewed the question as to pre-trial publicity and found that such did not

corrupt the trial. Such State court findings must be presumed to be correct by any Federal court which reviews the matter. 28 U.S.C. §2254(d); *Smith v. Phillips*, 455 U.S. 209, 218 (1982); *Sumner v. Mata*, 449 U.S. 539, 551 (1981).

The United States District Court for the Western District of Pennsylvania was the initial Federal court which was faced with a review of the State court findings. Although the District Court did note the presumption of validity in accord with 28 U.S.C. §2254(d), the opinion of the Court makes clear that an independent evaluation of the record was conducted. District Judge Ziegler in expressing his findings noted:

> "The pre-trial publicity in Clearfield County prior to trial was found to be balanced and accurate, and we cannot conclude from our independent review of the record that there is convincing evidence to the contrary.
>
> * * *
>
> Most importantly there is no evidence of record of official misconduct either in dismissing the rape charge prior to trial, or in influencing the publicity given the case as in Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963) or Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966). Nor does the pre-trial publicity reveal the viciousness evidenced in Rideau, Sheppard, or Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed. 2d 751 (1961). Finally, the publicity in quantity does not approach the mischief detected in Sheppard.
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> * * *

> We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County, or that the coverage utterly corrupted the judicial process." (Opinion of the Honorable Donald E. Ziegler dated April 22, 1982, pp. 5-6, J.A. 789a-790a).

Even the United States Court of Appeals for the Third Circuit in reviewing the District Court decision found that the pre-trial publicity was not such that the trial was corrupted. Circuit Judge Hunter in the opinion of the Court stated: "The publicity in this case, though it had a high potential for prejudice, did not utterly corrupt the trial atmosphere in that fashion." (J.A. 858a). Circuit Judge Garth, in his concurring opinion, noted: "In this case, no juror was exposed to adverse publicity during trial, and the record reflecting the publicity preceeding Yount's second trial, in my opinion, was not so inflammatory as to give rise to a presumption of partiality." (J.A. 882a).

Thus, every court which has reviewed the pre-trial publicity surrounding the Yount case has found that the nature and quantity of such publicity was *not* such that the trial proceedings were "utterly corrupted". Yount has failed to carry his burden of establishing, for purpose of Federal court review, that the pre-trial publicity infringed on his ability to select and impanel a fair and impartial jury.

II. WHETHER A FEDERAL COURT IN REVIEWING A STATE COURT CONVICTION BY WAY OF A HABEAS CORPUS PETITION MAY DISREGARD THE SWORN TESTIMONY OF JURORS TO REMAIN IMPARTIAL AND FIND THAT THE DEFENDANT WAS DENIED A FAIR TRIAL ON THE BASIS THAT THE JURORS WERE BIASED BY PRE-TRIAL PUBLICITY

A. Introduction

Throughout the history of our nation, the dual Federal and State court systems have consistently strived to interpret and carry out the ideals and provisions of the United States Constitution. As is bound to happen when two independent bodies consider the same law, a variance of opinions often occurs as to the interpretation to be accorded a particular provision, the end result being that the Federal court system and the State court system are brought into conflict with one another. Numerous attempts have been made to remedy and avoid these areas of conflict while still allowing the two court systems the flexibility and discretion which they each deserve. Such attempts to avoid conflict have taken the form of both statutory law and the judicially-made doctrine of abstention.

In certain areas of the law, conflict between the Federal and State court systems may simply not be avoided. One such area is that raised by the instant case of habeas corpus review. Each time a Federal court accepts a habeas corpus petition from a person held in State custody, the two court system is placed in the delicate position of attempting to maintain the balance between the two systems.

B. Presumption of Correctness of State Court Determination

It was apparently in an effort to control and limit the friction between the State and Federal courts that Congress in 1966 enacted subsection (d) of 28 U.S.C. §2254[1] as an amendment to the original Federal Habeas Act of 1867. As a result of the amendment, the findings of a State court are presumed to be correct unless the Federal court when

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[1] 28 U.S.C. §2254(d) provides:

"§2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS

. . . .

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

reviewing those findings can articulate that one of seven specific conditions exist. If none of the seven conditions exist, then the Federal court may only rebut the presumption of correctness of the State court findings if it can be established that the State court determination is not fairly supported by the record. The burden of establishing that such is the case falls upon the habeas petitioner to establish by convincing evidence that the State court determination was in error. *Sumner v. Mata*, 449 U.S. 539, 550-551 (1981); *Smith v. Phillips*, 455 U.S. 209, 218 (1982).

In order to assure that the congressional intent in establishing 28 U.S.C. §2254(d) is not frustrated as well as

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(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

to assure ease of review by courts of appeals and this Court, the opinion of *Sumner* established the requirement "that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly by the record.' " *Sumner v. Mata*, 449 U.S. 539, 551 (1981). Thus, even before a Federal court may reach the point of determining an issue as to the effect of pre-trial publicity on jurors and their assurance of impartiality, a specific finding must first be made which allows the Federal court to proceed beyond the presumption of correctness of the State court determination. Only if such a finding can be made, may the Federal court proceed to its own determination as to the issue involved.

C. Pre-Trial Publicity Test

Assuming that the Federal court can satisfy the requirements of 28 U.S.C. §2254(d), its determination of the issues raised in the habeas corpus petition in the instant case is still limited to some extent. "A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provisions of the United States Constitution." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). "Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips*, 455 U.S. 209, 221 (1982); *Chandler v. Florida*, 449 U.S. 560, 570 (1981); *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). "Before a federal court may overturn a conviction resulting from a state trial . . . it must be established not merely that the [State's action] is undesirable, erroneous, or even 'universally condemned,' but that it vio-

lated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973), quoted in *Smith v. Phillips*, 455 U.S. 209, 221 (1982).

In specific as to the pre-trial publicity issue, the reviewing Federal court is even more limited. As has been set forth previously within this brief: "A state court conviction may be overturned in a habeas proceeding *only* where the defendant shows that the publicity had been so extreme as to cause actual prejudice to a degree rendering a fair trial impossible or that the press coverage has 'utterly corrupted' the trial. (Emphasis added) *Murphy v. Florida*, 421 U.S. at 798, 95 S.Ct. at 2035. See also: *Dobbert v. Florida*, 432 U.S. 282, 303, 97 S.Ct. 2290, 2303, 53 L.Ed. 2d. 344 (1977)." *Martin v. Warden*, 653 F.2d 799, 805 (3d. Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982). Thus, the Federal court's review as to pre-trial publicity issues is narrowed considerably.

As has previously been argued within this brief, the pre-trial publicity with regard to the Yount case was *not* such that it "utterly corrupted" the trial. Every court which has reveiwed the case has reached the same conclusion in that regard. Therefore, the only manner in which Yount may prevail is to establish that the pre-trial publicity was so extreme as to have resulted in actual prejudice to the trial of his case before Clearfield County jurors. The mere fact that a potential juror has heard of the case or even that he has formed an opinion as to guilt or innocence is not sufficient to remove him from the case. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723 (1961). The showing of partiality on the part of a juror or the panel as a

whole is upon the petitioner. Only upon such a showing may Yount prevail on the pre-trial publicity partiality issue.

It is, therefore, apparent that a Federal court in reviewing a State court conviction within a habeas corpus proceeding may find that, despite the assurances of the jurors to the contrary, the defendant was denied a fair trial by an impartial jury. Such a decision must, however, take place only if certain very strict conditions and circumstances are adhered to by the Federal court. The court must first demonstrate that the full requirements of 28 U.S.C. §2254 (d) have been considered and that the presumption of correctness of the State court determination has been properly rebutted. The Court must then find that the habeas petitioner has established that pre-trial publicity with regard to his case was so extreme as to cause actual prejudice such that a fair trial was impossible.

III. WHETHER THE FEDERAL COURT OF APPEALS IMPROPERLY APPLIED THE STANDARDS SET FORTH IN *MARSHALL V. UNITED STATES*, 360 U.S. 310 (1959), AS TO JUROR PREJUDICE TO A STATE COURT CONVICTION THEREBY VIOLATING THE HOLDING SET FORTH IN *MURPHY V. FLORIDA*, 421 U.S. 794 (1975)

A. Introduction

This Court in *Marshall v. United States*, 360 U.S. 310 (1959), sets forth a holding which allowed the Federal courts to overturn the verdict of a jury, when it appeared to the Court that the publicity before or during a case was such that the jury could be prejudiced toward the defendant. This Court in *Marshall*, found that the members of the jury during the course of trial had been exposed to information which had previously been ruled upon by the trial court to be non-admissible as being prejudicial to the defendant. The Court found that in the exercise of its supervisory power over the Federal courts, a new trial was mandated. See: *Marshall v. United States*, 360 U.S. 310, 312-313 (1959).

Following the holding in *Marshall*, this Court had occasion to apply the same standards to a State court proceeding in *Irvin v. Dowd*, 366 U.S. 717 (1961). That case, which deals with the determination of prejudice as a result of pre-trial publicity, involved circumstances where the community prior to trial was bombarded with inflammatory publicity concerning not only the charges to be tried but also numerous other allegations of criminal involvement. This Court, after reviewing the standards to be applied to jurors who had been exposed to pre-trial publicity,

proceeded further and found that regardless, as to the assertions of impartiality by the jurors, the community as a whole was prejudiced toward the defendant. This Court found that the statements of impartiality by the jurors should be given little weight considering the prejudice found to exist within the community. *Irvin v. Dowd*, 366 U.S. 717, 727-728 (1961).

Following *Irvin*, the Court had numerous other chances to consider the impact of publicity on trial proceedings. Some of the most notable decisions being: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In each instance, a State court conviction was overturned on the basis that publicity had in some manner influenced the trial. Finally in 1975, a case reached this Court, *Murphy v. Florida*, 421 U.S. 794 (1975), concerning the issue as to whether the standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), were equally applicable to State court proceedings. In the interim, the Federal courts of appeals had issued conflicting decisions as to the applicability of *Marshall*. See: *United States ex rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir., 1973).

In *Murphy v. Florida*, 421 U.S. 794, 798 (1975), this Court stated:

> "In the face of so clear a statement, it cannot be maintained that Marshall was a constitutional ruling now applicable, though the Fourteenth Amendment, to the States. . . . We cannot agree that Marshall has any application beyond the federal courts."

In *Murphy*, this Court found that the pre-trial publicity was not such that it "utterly corrupted" the trial nor was it so

extensive that actual prejudice could be found to exist. The instant case presents to this Court for review issues the same as those considered in *Murphy*. As has been demonstrated previously within this brief, the pre-trial publicity surrounding the Yount trial was not such that the trial was "utterly corrupted." Each court which has reviewed that question has reached a similar conclusion.

The instant argument, therefore, deals only with Yount's claim that pre-trial publicity had resulted in actual prejudice to the extent that a fair trial by an impartial jury could not be obtained. It is the position of the Petitioners that the United States Court of Appeals for the Third Circuit committed error in finding that actual prejudice existed in Yount's case.

B. Presumption of Correctness of State Court Determination

As has been indicated earlier in this brief, a State court determination of an issue must be presumed to be correct by a Federal court seeking to review a habeas corpus petition. Only upon a specific showing that one of seven factors is present or that the State court finding is not adequately supported by the record may the presumption accorded to the State court finding be rebutted. The burden is placed upon the habeas petitioner to establish by convincing evidence that the State court determination is improper. 28 U.S.C. §2254 (d); *Sumner v. Mata*, 449 U.S. 539, 550-551 (1981); *Smith v. Phillips*, 455 U.S. 209, 218 (1982). Further, the Federal court must specifically articulate its findings indicating its reasons why the presumption established by 28 U.S.C. §2254 (d) is not being followed.

In the present case before this Court, it is the position of the Petitioners that Yount has failed to establish by convincing evidence that the State court determination is improper. The United States Court of Appeals for the Third Circuit committed error in finding that the presumption of validity has been rebutted. The only reference indicating that the Court of Appeals even considered the effect of 28 U.S.C. §2254(d) is found in footnotes 21 and 22 of the Court of Appeals Opinion (J.A. 861a-862a).

The text of footnote 21 clearly reveals the error made by the Court of Appeals (J.A. 861a). That reference by the Court of Appeals indicates that the trial court erred in its finding that between trial and retrial there was very little publicity or media attention devoted to the case. The trial court could not have been more correct. From the time of the conclusion of the first trial to the commencement of the second trial with voir dire on November 4, 1970, the record only evidences fifteen news articles concerning Yount's case. What makes the trial court's determination even more credible is that those articles were spread out over a period of four years. The Court of Appeals' indication that there were sixty-six front-page articles fails to take into consideration that once the jurors were chosen they were sequestered from such news coverage. Further, the figure reached by the Federal Court of Appeals does not even cover the same period as the trial court and thus no comparison may be made.

Nor does the voir dire record support the finding of the Court of Appeals that the trial court erred in indicating that there had been very little discussion of the second trial in public (J.A. 862a). Although, the voir dire does indicate some discussion did take place, it is clear that the majority of the members of the panel were not asked when

they had heard the discussions take place. The Court of Appeals improperly makes the assumption that such discussions occurred just prior to the second trial as opposed to four years prior thereto at the time of the first trial.

The trial court within its memorandums of September 21, 1970 (J.A. 260a), November 14, 1970 (J.A. 264a-265a) and opinion of January 15, 1973 (J.A. 268a) makes clear that there was no indication whatsoever that pre-trial publicity had caused actual prejudice to Yount such that a fair and impartial jury could not be selected. The Supreme Court of Pennsylvania concurred with the trial court's determination by stating: "Neither does the voir dire, as appellant argues, reveal a 'clear and convincing' build-up of prejudice or a ' "pattern of deep and bitter prejudice" shown . . . throughout the community' which would require a change of venue. *Irvin v. Dowd*, 366 U.S. 717, 725, 728, 81 S.Ct. 1639, 1644, 1645, 6 L.Ed. 2d 751 (1961)" *Commonwealth v. Yount*, 455 Pa. 303, 314 A.2d 242, 247 (1974) (J.A. 284a-285a). Such State court determinations must be found to be correct pursuant to 28 U.S.C. §2254(d). Yount has not produced sufficient evidence to rebut the presumption of the correctness of the State court findings.

Even the District court found that the State court determination was correct. Judge Ziegler stated:

> ". . . we find nothing in the pre-trial publicity, or the responses of the citizens who were excused for cause, or the number of such recusals, or the attitudes of the jurors who were seated, that leads to the conclusion that the venire was presumptively prejudiced so as to require a change of venue. . . . Petitioner has failed to establish that community bias prevented the

> selection of an impartial jury in Clearfield County in contravention of the Fourteenth Amendment." (Opinion of the Honorable Donald E. Ziegler dated April 22, 1982, pp. 16-17, J.A. 805a).

Judge Ziegler at an earlier point in his opinion p. 6 (J.A. 790a) concluded, "We find that petitioner has failed in his burden of establishing publicity so extreme as to cause actual prejudice rendering a fair trial impossible in Clearfield County. . . ."

C. Actual Prejudice Claim

It is Yount's contention that pre-trial publicity was so extensive that actual prejudice resulted in the community as a whole such that a fair trial by an impartial jury was impossible. The United States Court of Appeals for the Third Circuit in granting the writ of habeas corpus agreed with Yount. That Court clearly reached its conclusion as a result of the application of the holding of this Court in *Irvin v. Dowd*, 366 U.S. 717 (1961), to the present case. The Petitioners would assert that the Court of Appeals erred in this regard. The *Irvin v. Dowd* decision is wholly inapplicable to the Yount case. The Court of Appeals improperly applied the *Irvin* test as to impartiality to the Yount trial.

At the outset, one must not lose sight of the whole purpose of voir dire. Voir dire examination exists for the purpose of allowing counsel and the Court to establish and determine whether one or more jurors has a preconceived opinion as to the guilt or innocence of the defendant. Further, it allows the opportunity for it to be established whether that particular juror may set aside his or her opinion and render a verdict based solely on the evidence pre-

sented at trial. At no time has an assertion been made by Yount that the voir dire examination conducted in his case was not adequate or extensive enough so as to allow a full inquiry into the jurors' feelings. The Court of Appeals concedes that the trial court did extend great leniency to the Petitioner (Yount) in his questioning of the veniremen (J.A. 863a, footnote 23).

Voir dire examination, thus, when properly conducted, acts as a primary safeguard of the question of juror impartiality. Effective use of challenges for cause and peremptory challenges act as an additional safeguard of impartiality of those selected to serve on the jury panel. The concept of due process requires not that members of a jury must be totally free of knowledge or opinions as to a case, but rather that they must be capable and willing to set aside their opinions and render a verdict based solely upon the evidence established at trial. The fact that any one juror may have a preconceived opinion as to guilt or innocence does not preclude him or her from serving on the jury. Such is not sufficient to rebut the presumption of that juror's impartiality. *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Irvin v. Dowd*, 366 U.S. 717, 722-723 (1961). Likewise, ". . . given a voir dire which is concededly adequate and which functions to achieve its designed purpose, a venue change is not constitutionally required simply because many of the persons who will *not* serve on the defendant's jury may harbor prejudices as to the defendant's guilt." Concurring opinion of Judge Garth in *Yount v. Patton*, 710 F.2d 956, 980 (1983), *cert. granted, Patton et al. v. Yount*, U.S. , 104 S.Ct. 272 (1983) (J.A. 887a).

In its application of the above principles to the Yount case, the Court of Appeals becomes too concerned with a

statistical analysis leading to generalization of the voir dire as a whole rather than dealing with the voir dire as a specific individual process designed to select those who are impartial to the case. Such arises from the Court attempting to apply the *Irvin v. Dowd*, 366 U.S. 717 (1961), test to the instant case as well as reaching for the prejudice found in *Marshall v. United States*, 360 U.S. 310 (1959). Yet even the per curiam opinion in *Marshall* discourages the use of generalizations as opposed to specific facts. "Generalizations beyond that statement are not profitable, because each case must turn on its special facts." *Marshall v. United States*, 360 U.S. 310, 312 (1959).

The Yount case is significantly different from *Irvin v. Dowd*, 366 U.S. 717 (1961), and is much more similar to *Murphy v. Florida*, 421 U.S. 794 (1975). In *Irvin*, eight out of twelve jurors indicated that they had fixed opinions as to the guilt of the defendant. In Yount, six out of twelve jurors testified that they had no preconceived opinion as to Yount's guilt. Of the remaining six jurors only one was challenged for cause (Hrin).

It is important to note that Yount did *not* challenge, in any form, nine of the jurors who decided his case (Hoover, Clapsaddle, Yorke, Waple, Karetski, Hummell, Parks, Undercoffer and Murphy). Such failure on his part to raise any challenge, either for cause or peremptorily, clearly leads to a strong conclusion that he was fully satisfied with them sitting on the jury. "The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions as to his guilt." *Beck v. Washington*, 369 U.S. 541, 557-558 (1962). Yount must not be allowed now, some thirteen years later, to change his mind and argue that the juors so selected were

not impartial to the case. If Yount, at the time of trial, had felt that either the individual jurors or the community as a whole were so prejudiced against him, surely he would have challenged for cause at least one if not all of these nine jurors. Further, in Yount, only three of the twelve jurors (Hrin, Kurtz and Harchak) were challenged for cause. Two of these three (Kurtz and Harchak) indicated that they had no fixed opinion. The third (Hrin), although indicating that he did have an opinion, stated that he would enter the jury box with an open mind. It should be noted that at the time the challenge for cause was made and denied as to juror Hrin, Yount still had a majority of his peremptory challenges remaining. Once again, if Yount felt so strongly that Hrin was prejudiced toward him, surely a peremptory challenge would have been made. None was. Obviously, any review as to the voir dire testimony of a juror must involve a complete review of the voir dire as a whole. When considered in that light, the voir dire of Hrin clearly indicates his position that he could enter the jury box with an open mind.

> "Q. Mr. Hrin, I have to come back to the question that—can you put aside whatever opinion you had—solid, unsolid or however you want to describe it—can you set it aside before you go into the jury box or would you need some evidence before you could change your mind? Now think about it for a second.
>
> A. I have to.
>
> Q. Give me yes or no?
>
> A. I think I could enter it with a very open mind, I think I could very easily. To say this is a requirement for some of the things you have to do every day." Voir Dire of James Hrin pp. 445-446, (J.A. 889a).

In *Irvin*, the voir dire consumed a period of four weeks during which time four hundred and fifteen people came before the court on voir dire. In Yount, the voir dire took place over the course of nine days and only one hundred sixty-seven people were brought before the Court on voir dire. Such clearly does not rise to the level of difficulty which apparently was experienced in *Irvin* in selecting a jury. In *Irvin*, the magnitude and nature of the publicity to which the community was exposed clearly was patently inflammatory. The public was exposed to extensive publicity concerning Irvin's confessions to not only the murder for which he was being tried but also to some twenty-four burglaries and five other murders. His prior criminal record was discussed as well as his identification at a police lineup and his offer to enter a plea of guilt for a particular sentence. The day prior to trial, his confession to the crime for which he was to be tried was reported in the news media. Yount presents an altogether different level of publicity. Each court which has reviewed the publicity surrounding the Yount case has found it to be accurate, factual in nature and published without editorial comment. Although there was publicity surrounding Yount's second trial, it did not rise to the level surrounding the first trial. In neither instance, did the publicity surrounding the Yount case rise to the levels or magnitude of that found in *Irvin*. The Yount case is clearly distinguishable from *Irvin*.

The Court of Appeals in Yount through it's application of the *Irvin* test becomes involved in a statistical generalization of the whole voir dire and publicity issue. The Court of Appeals' opinion if followed would clearly lead to the demise of the voir dire system. As Judge Garth indicates in his concurring opinion:

> "To my mind, this reliance on statistics, without regard to the scope of the *voir dire* or the absence of challenges for cause, elevates to talismanic significance the percentage of veniremen *as a whole* with opinions about a defendant's guilt. I do not believe *Irvin v. Dowd* was ever intended to be read in this fashion. If the scope of *voir dire* is ample—as it concededly is in this case—the fact that a large percentage of persons who are not on the jury have prejudices should carry little weight." Concurring opinion of Judge Garth in *Yount v. Patton*, 710 F.2d 956, 980 (1983), *cert. granted, Patton et al. v. Yount*, U.S. , 104 S.Ct. 272 (1973) (J.A. 886a-887a).

Must a trial judge, following completion of voir dire in a case, call a recess so that he might calculate the percentage of those persons who had indicated opinions as to the case? Even though none of those persons have been seated on the jury, must he grant a mistrial on the basis that a certain magical percentage has been reached such that bias may be imputed? To do so would mean the end of meaningful voir dire examination. Certainly that is not the intent of this Court as a result of the *Irvin v. Dowd* case. The Yount case more closely resembles that which was presented to this Court in *Murphy v. Florida*, 421 U.S. 794 (1975), than that found in *Irvin v. Dowd*, 366 U.S. 717 (1961). The standards set forth in *Marshall v. United States*, 360 U.S. 310 (1959), and applied to a State court conviction in *Irvin* clearly are inapplicable to the instant case. Yount has failed to establish that there was actual prejudice or that such could be imputed to those persons selected to hear his case. Nine of the jurors were seated with no challenges of any form having been made. The voir dire conducted was more than adequate to assure that

those persons who sat on the jury were fair and impartial. Yount has failed to establish that the pre-trial publicity surrounding his case was so extensive that actual prejudice was created.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be vacated with directions to affirm the judgment of the United States District Court for the Western District of Pennsylvania.

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